LIM CHIA MIN

v.

CHEAN SANG NGEOW & ANOR.

FEDERAL COURT, KUALA LUMPUR
LAMIN MOHD YUNUS PCA
EDGAR JOSEPH JR FCJ
MOHAMED DZAIDDIN FCJ
[CIVIL APPEAL NO: 02-515 OF 1993]
6 DECEMBER 1996

CONTRACT: *Construction - Sale and purchase agreement - Whether there was a valid and binding contract - Intention of parties - Whether language used clear and unambiguous - Phrase "a formal agreement will be executed" - Effect - Whether showing a conditional agreement - Whether reflecting only a desire to implement agreed terms*

The appellant was a shareholder and director of a limited company known as WONSON Garment Sdn. Bhd. ('WONSON'). The respondents, who were husband and wife, were the shareholders/proprietors of business concerns known as Fah Bee Sdn. Bhd., Cheepy Cheep Children Centre and Sykt. Seng Fah. The appellant had wanted to purchase the respondents' said businesses and so executed a letter dated 25 September 1990 ('AB1') for the purpose. Upon executing AB1, the appellant paid the respondents RM5,000, "being earnest moneys and part payment for the purchase". This sum apart, another RM10,000 was paid by the appellant, also as part payment of the intended purchase.

Paragraph 2 of AB1 stipulates "It is proposed that a formal agreement will be executed between us within 4 (four) weeks from the date hereof. Should this agreement not be finalised by 23 October 1990, the sum of RM5,000 shall be forfeited by you". On 22 October 1990, in compliance with the terms of AB1, particularly para. 2 thereof, two sale and purchase agreements ('AB3-12 and AB14-31') were prepared by the appellant's solicitors and excuted by the parties. By these agreements, the appellant undertook to purchase the businesses for a consideration of RM1 million. WONSON was not involved in the execution of AB3-12 and AB14-31, but nonetheless, after the parties executed the agreements, WONSON paid two cheques totalling RM485,000 to the respondents, and thereafter, the businesses were handed over to the appellant by the respondents.

The appellant had not paid the respondents the balance purchase sum of RM500,000. In the ensuing action by the respondents to recover the same, the appellant argued that AB1 was not a valid contract, and no liability could therefore attach to him. The learned trial Judge held that there was in AB1 a binding contract and so gave judgment for the respondents. According to the learned Judge, the language in AB1 was plain and unambiguous, and that there was nothing improper in the manner of execution of the agreement. The trial Judge further held that the words "a formal agreement will be executed" in para. 2 of AB1 did not make AB1 a conditional agreement, as the words merely reflected a desire of the parties as to how to implement the terms in AB1. His Lordship also ruled that WONSON was only a vehicle used by the appellant and was not therefore the real purchaser. The appellant appealed, and before the learned Judges here the primary questions that arose were:

(i) Whether AB1 constitutes a concluded contract between the respondents and the appellant; and consequently

(ii) Whether para. 2 of AB1 is a condition or term of the bargain between the parties, making AB1 a conditional contract until the execution of a formal agreement, or, whether the paragraph is merely an expression of the desire of the parties as to the manner in which the transaction already agreed to will in fact go through.

Held:
Per Mohamed Dzaiddin FCJ:

[1] It is a question of construction whether the execution of the further contract here is a condition or term of the bargain, or whether it is a mere expression of the desire of the parties as to the manner in which the transaction already agreed to will in fact go through. In the former case there is no enforceable contract. In the latter case there is a binding contract and reference to the more formal document may be ignored.

[2] In our view, when parties "proposed that a formal agreement would be prepared and executed", they must mean what they say. It is quite absurd to construe AB1 as a formal agreement which would mean that under para 2, it has to be executed again within four weeks from the date of AB1.

[3] The events which followed after the first respondent received AB1 and the cheque of RM5,000 from the appellant were consistent with the aforesaid intention of the parties. First, the instruction to the solicitors to prepare the formal sale and purchase agreements, AB3-12 and AB14-31, which contained elaborate terms and conditions of the sale. This was

followed by the execution of the said agreements by both respondents at the solicitor's office on 22 October 1990, and the receipt of two cheques for a total sum of RM485,000. From the evidence, it is clear that the terms in AB1 were never performed and the parties proceeded to complete the sale on the basis of the terms and conditions of the formal agreements AB3-12 and AB14-31.

[4] Paragraph 2 should also be considered in the light of para. 3 which contains what purports to be "the main terms of this agreement". The words "this agreement" here cannot mean AB1, but must refer to the proposed formal agreement as envisaged by para. 2.

[5] There are eight conditions in para. 3 of AB1, which have not been expressed in greater detail. A prudent buyer of a medium-size business, which business he has agreed to purchase for RM1 million, will surely want a more elaborate sale and purchase agreement containing specific clauses, such as, the firm's assets and liabilities, vendor's undertakings and warranties, appropriate indemnity clauses, etc. None of these clauses are to be found in para. 3.

[6] Conditions (1), (2) and (3) of para. 3, which refer to purchase consideration, stipulate the schedule and time of payment of the purchase price, to be calculated from the date of the execution of the agreement. In our view, time cannot run from the date of the signing of AB1 itself. It will not be reasonable for the parties to have intended that the appellant, who had paid RM5,000 as earnest money and part-payment, which will be forfeited if the formal agreement is not finalised by 23 October 1990, to also pay RM100,000 at the same time (i.e upon signing AB1) under condition (1) of para. 3 of AB1. The inference must be that, payments will be made at the stipulated period of time which runs from the date of the execution of the formal agreement.

[7] On its true construction, AB1 does not constitute a legally binding contract between the parties, but merely a letter written by the appellant to the respondents expressing a willingness to purchase the latter's businesses and a basis for, and subject to the preparation and execution of a formal agreement containing elaborate terms and conditions.

[8] On the evidence, the learned trial Judge was wrong in his conclusion that WONSON was not the actual buyer. The two cheques belonged clearly to WONSON. There was also documentary evidence which showed that both the respondents were employees of WONSON, and that, in July 1991, the first respondent had executed Form M.V. 3 transferring the ownership of the firms' three vehicles to WONSON. The facts also showed that

upon signing AB3-12 and AB14-31, and receiving the sum of RM500,000, the respondents had handed over the management and control of their businesses to WONSON. All these showed that WONSON was the real purchaser of the respondents' businesses under AB3-12 and AB14-31, notwithstanding that it did not execute the agreements.

[Appeal dismissed.]

*[**Bahasa Malaysia** Translation of Headnotes]*

***KONTRAK:** Pentafsiran - Perjanjian jualbeli - Samada terdapatnya kontrak yang sah dan mengikat - Niat pihak-pihak - Samada bahasa yang digunakan jelas dan tiada keraguan - Ungkapan "a formal agreement will be executed" - Kesan - Samada menunjukkan suatu perjanjian bersyarat - Samada mencerminkan hanya satu keinginan untuk melaksanakan terma-terma yang dipersetujui*

Perayu adalah pemegang saham dan pengarah sebuah syarikat sendirian berhad yang dikenali sebagai WONSON Garment Sdn Bhd (WONSON). Responden-responden, yang merupakan pasangan suami isteri, adalah pemegang saham/ pemilik perniagaan yang dikenali sebagai Fah Bee Sdn Bhd., Cheepy Cheep Children Centre dan Syarikat Seng Fah. Perayu hendak membeli perniagaan-perniagaan responden tersebut dan telah menyempurnakan surat bertarikh 25 September 1990 ("AB1) bagi tujuan itu. Setelah menyempurnakan AB1, perayu telah membayar responden RM5,000 "being earnest monies and part payment for the purchase". Selain daripada jumlah ini, sebanyak RM10,000 lagi telah dibayar oleh perayu, juga sebagai sebahagian dari bayaran pembelian yang diniatkan itu.

Perenggan 2 AB1 menetapkan "It is proposed that a formal agreement will be executed between us within 4 (four) weeks from the date hereof. Should this agreement not be finalised by 23 October 1990, the sum of RM5,000 shall be forfeited by you". Pada 22 Oktober 1990, bagi mematuhi terma-terma AB1, khususnya perenggan 2 di situ, dua perjanjian jualbeli ("AB3-12 dan Ab14-31") telah disediakan oleh peguamcara perayu dan disempurnakan oleh pihak-pihak yang berkenaan. Melalui perjanjian-perjanjian ini, perayu telah mengakujanji untuk membeli perniagaan-perniagaan tersebut bagi satu balasan sebanyak RM1 juta. WONSON tidak terlibat dalam penyempurnaan AB3-12 dan AB14-31, tetapi namun begitu, selepas pihak-pihak tersebut menyempurnakan perjanjian-perjanjian itu, WONSON telah membayar dengan dua cek berjumlah sebanyak RM485,000 kepada responden-responden, dan selepas itu, perniagaan-perniagaan tersebut telah diserahkan kepada perayu oleh responden-responden tersebut.

Perayu tidak membayar kepada responden baki harga belian sebanyak RM500,000. Dalam tindakan yang berikutnya oleh responden-responden untuk mendapatkan bayaran, perayu berhujah bahawa AB1 bukannya merupakan kontrak yang sah, dan dengan itu tiada apa-apa tanggungan boleh dikenakan keatas beliau. Hakim yang bijaksana memutuskan bahawa AB1 adalah satu kontrak yang mengikat dan dengan itu memberikan penghakiman yang memihak kepada responden-responden. Menurut Hakim yang bijaksana, bahasa dalam AB 1 adalah jelas dan nyata, dan tidak terdapat apa-apa yang tidak wajar dalam cara penyempurnaan perjanjian tersebut. Hakim perbicaraan selanjutnya memutuskan bahawa perkataan-perkataan "a formal agreement will be executed" dalam perenggan 2 AB1 tidak menjadikan AB1 satu perjanjian bersyarat, kerana perkataan-perkataan itu hanya mencerminkan satu keinginan pihak-pihak tersebut mengenai bagaimana untuk melaksanakan terma-terma di dalam AB1. Yang Arif juga memutuskan bahawa WONSON adalah hanya suatu alat yang telah digunakan oleh perayu yang merupakan pembeli yang sebenarnya. Perayu telah merayu, dan di hadapan Hakim-hakim yang bijaksana di sini persoalan utama yang berbangkit adalah:

(i) Samada AB 1 membentuk satu kontrak yang muktamad antara responden-responden dan perayu; dan oleh yang demikian

(ii) Samada perenggan 2 AB1 adalah suatu syarat atau terma tawaran antara pihak-pihak tersebut, yang menjadikan AB1 suatu kontrak bersyarat sehingga penyempurnaan satu perjanjian yang formal, atau, sama ada perenggan tersebut adalah semata-mata suatu penyataan keinginan pihak-pihak tersebut berhubung dengan cara dalam mana transaksi itu yang telah pun dipersetujui akan dilaksanakan.

Diputuskan:
Oleh Mohamed Dzaiddin HMP

[1] Adalah merupakan persoalan pentafsiran sama ada penyempurnaan kontrak selanjutnya di sini adalah suatu syarat atau terma tawaran itu, atau ianya semata-mata penyataan keinginan pihak-pihak tersebut berhubung dengan cara dalam mana transaksi tersebut yang telah pun dipersetujui akan pada hakikatnya dilaksanakan. Dalam kes yang terdahulu tidak terdapat kontrak yang boleh dikuatkuasakan. Dalam kes yang kemudian, terdapat kontrak yang mengikat dan rujukan kepada dokumen yang lebih rasmi tidak perlu dihiraukan.

[2] Kami berpendapat, bilamana pihak-pihak "proposed that a formal agreement would be prepared and executed", mereka mestilah mempunyai maksud akan apa yang mereka katakan. Adalah agak mustahil untuk mentafsirkan

AB1 sebagai satu perjanjian rasmi yang mana akan bermakna bahawa di bawah perenggan 2, ianya perlu disempurnakan sekali lagi dalam tempoh 4 minggu daripada tarikh AB 1.

[3] Peristiwa-peristiwa yang berlaku selepas responden pertama menerima AB1 dan cek bagi nilai sebanyak RM5000 daripada perayu adalah konsisten dengan niat pihak-pihak tersebut sepertimana yang dikatakan di atas. Pertama, terdapat arahan kepada peguamcara untuk menyediakan perjanjian jualbeli yang rasmi, AB3-12 dan AB14-31, yang mana mengandungi terma-terma dan syarat-syarat yang teliti mengenai jualan tersebut. Ini kemudiannya diikuti oleh penyempurnaan perjanjian-perjanjian tersebut oleh kedua-dua responden di pejabat peguamcara tersebut pada 22 Oktober 1990, dan penerimaan dua cek berjumlah sebanyak RM485,000. Daripada keterangan itu, ianya jelas bahawa terma-terma dalam AB1 tidak pernah dilaksanakan dan pihak-pihak tersebut telah meneruskan penyelesaian jualan itu atas dasar terma-terma dan syarat-syarat perjanjian-perjanjian rasmi, AB3-12 dan AB14-31.

[4] Perenggan 2 seharusnya juga dipertimbangkan dengan mengambilkira perenggan 3 yang mana mengandungi apa yang dikatakan sebagai "the main terms of this agreement". Perkataan-perkaran "this agreement" di sini tidak boleh bermakna AB 1, tetapi mestilah merujuk kepada perjanjian rasmi yang dicadangkan sepertimana yang dibayangkan oleh perenggan 2.

[5] Terdapat lapan syarat dalam perenggan 3 AB1, yang mana telah tidak dinyatakan secara terperinci. Seorang pembeli yang berhemat ketika membeli sebuah perniagaan yang sederhana besarnya, di mana beliau telah bersetuju untuk membeli perniagaan itu bagi nilai sebanyak RM1 juta, tentunya menghendakkan perjanjian jualbeli yang lebih teliti yang mengandungi fasal-fasal khusus, seperti aset-aset dan tanggungan-tanggungan firma itu, akujanji penjual dan waranti-waranti, fasal-fasal tanggunganrugi yang wajar, dan lain-lain. Tidak satu pun daripada fasal-fasal ini terdapat dalam perenggan 3 .

[6] Syarat-syarat (1), (2) dan (3) perenggan 3, yang mana merujuk kepada balasan pembelian, menetapkan jadual dan masa pembayaran harga belian, yang hendaklah dihitung daripada tarikh penyempurnaan perjanjian tersebut. Kami berpendapat, masa tidak boleh bermula daripada tarikh menandatangani AB 1 itu sendiri. Adalah tidak wajar bagi pihak-pihak itu untuk mengharapkan supaya perayu, yang telah membayar RM5000 sebagai wang cengkeram dan sebahagian pembayaran, yang mana akan dirampas jika perjanjian rasmi tidak dimuktamadkan selewat-lewatnya pada 23 Oktober 1990, untuk juga membayar RM100,000 pada waktu yang sama

(iaitu setelah menandatangani AB1) di bawah syarat (1) perenggan 3 AB1. Kesimpulannya adalah bahawa, pembayaran-pembayaran akan dibuat pada tempoh masa yang ditetapkan yang mana bermula daripada tarikh penyempurnaan perjanjian rasmi tersebut.

[7] Berdasarkan tafsirannya yang sebenar, AB1 tidak membentuk satu kontrak sah yang mengikat antara pihak-pihak itu, tetapi semata-mata merupakan surat yang ditulis oleh perayu kepada responden menyatakan kesediaannya untuk membeli perniagaan-perniagaan pihak yang terkemudian itu, dan satu asas untuk, dan tertakluk kepada penyediaan dan penyempurnaan satu perjanjian rasmi yang mengandungi terma-terma dan syarat-syarat yang teliti.

[8] Berdasarkan keterangan yang ada, Hakim perbicaraan yang bijaksana adalah salah dalam kesimpulannya bahawa WONSON bukannya merupakan pembeli yang sebenar. Kedua-dua cek itu jelasnya kepunyaan WONSON. Terdapat juga keterangan dokumentari yang menunjukkan bahawa kedua-dua responden adalah kakitangan WONSON, dan bahawa, dalam bulan Julai 1991, responden pertama telah menyempurnakan Borang M.V. 3 yang memindahkan pemilikan ketiga-tiga kenderaan firma tersebut kepada WONSON. Fakta-fakta juga menunjukkan bahawa setelah menandatangani AB3-12 dan AB14-31, dan menerima wang sejumlah RM500,000, responden-responden telah menyerahkan pengurusan dan kawalan perniagaan mereka kepada WONSON. Kesemua ini menunjukkan bahawa WONSON adalah pembeli sebenar perniagaan-perniagaan responden di bawah AB3-12 dan AB14-31, walaupun ia tidak menyempurnakan perjanjian-perjanjian tersebut.

[Rayuan ditolak.]

Cases referred to:

Esso Standard Malaya Bhd. v. Southern Cross Airways (M) Bhd. [1972] 1 MLJ 168 ***(foll)***

Von Hatzfeldt-Wildenburg v. Alexander [1912] 1 Ch. 284 ***(foll)***

Winn v. Bull [1877] 7 Ch. D. 29 ***(refd)***

Chinnock v. Marchioness of Ely 4 D.J. & S. 638 ***(cit)***

Rossiter v. Miller [1877] 5 Ch. D. 648 ***(cit)***

Ayer Hitam Tin Dredging Malaysia Bhd v. Y.C. Chin Enterprises Sdn. Bhd. ('AHTD') [1994] 3 CLJ 133 ***(refd)***

Crossley v. Maycock [1874] 43 LJ Ch. 379 ***(cit)***

Legislation referred to:

Income Tax Act 1967, s. 83(3)

For the appellant - Chan Kok Keong; M/s. Chan & Associates
For the respondents - Lee Min Choon; M/s. Lee Min Choon & Co.

JUDGMENT

Mohamed Dzaiddin FCJ:

This appeal is concerned with an action brought by the respondents, who were the plaintiffs in the Court below, to recover from the appellant, the defendant, a sum of RM500,000 being the balance of the purchase price for the sale of the respondents' businesses allegedly sold to the appellant. For convenience and brevity, we shall refer the appellant and the respondents as the defendant and plaintiffs respectively.

The plaintiffs' claim against the defendant is founded on a letter dated 25 September 1990 (AB1), written by the defendant to them, which contained terms and conditions of the sale of their businesses to the defendant. In consequence of AB1, the plaintiffs had received from the defendant cheques totalling RM500,000, and handed over their businesses to the defendant. Despite demand being made, the defendant had failed to pay the balance sum of RM500,000. The defendant denied that AB1 constituted a valid contract made between the plaintiffs and him. He contended that AB1 was merely a letter expressing an intention and desire of the parties that a formal agreement would be executed between the plaintiffs as vendors of one part, and Wonson Garment Sdn. Bhd. ('Wonson') as purchasers of the other part, of which the defendant was at the material time a shareholder and director. Thus, in compliance with the terms in AB1, two formal sale and purchase agreements, AB3-12 and AB14-31, were prepared by the solicitors acting on his instructions, which the plaintiffs executed on 22 October 1990.

AB1 states as follows:

> 25 September 1990
>
> Mr. Cheah Sang Ngeow & Madam Tai Gait Kham,
>
> Dear Sir & Madam,
>
> Re: Purchase of Fah Bee Sdn. Bhd.
> Cheepy Cheep and Syarikat Seng Fah
>
> Persuant to our discussions I enclose herewith my cheque SBB473460 for RM5,000 being earnest monies and part payment for the purchase of the abovenamed companies for a total consideration of RM1,000,000.
>
> It is proposed that a formal agreement will be executed between us within 4 (four) weeks from the date hereof. Should this agreement not be finalised by 23 October 1990, the sum of RM5,000 shall be forfeited by you.

The main terms of this agreement are as follows:

1) Upon signing the agreement a sum of RM100,000 shall be paid to you;

2) Within five (5) months from date of execution of agreement (hereinafter referred to as "the Purchase Date") a further sum of RM400,000 to be paid to you;

3) Within two (2) years from the Purchase Date the balance sum of RM500,000;

4) All taxes incurred bonuses payable sales revenues and all other expenses will be apportioned between the parties as at the Purchase Date;

5) That upon execution of the agreement your goodself and your wife shall be employed by the abovenamed companies for a duration of three (3) years at a minimum salary of RM1,800 and RM1,200 respectively;

6) That all creditors and trade debtors pertaining to transactions up to Purchase Date shall be for the account of you personally and the creditors shall be settled within one (1) month of Purchase Date;

7) That the four (4) trade marks Cheepy Cheep, Lambikins, Baby Winks and Dumbo is included in the purchase consideration of RM1,000,000;

8) That the existing factory premises at Taman Mutiara shall be let to the company for a period of three (3) years at a rental of RM1,300 per month.

I trust you will cooperate with me in finalising the agreement as soon as possible.

Kindly acknowledge receipt of this letter and cheque herewith.

Yours faithfully,

Sgd: Lim Chia Min Sgd:

Receipt acknowledged.

At the trial, it was established that some time in July 1990, the defendant had entered into negotiations with the 1st plaintiff for the purchase of the plaintiffs' businesses. The plaintiffs, who are husband and wife, were sole-proprietors of Syarikat Seng Fah and Cheepy Cheep Children Centre respectively. In addition, they were the only shareholders of Fah Bee Sdn. Bhd. As a result of the negotiations, AB1 was drawn up by the defendant who also paid the plaintiffs by cheque a sum of RM5,000. Subsequently, in October 1990, the plaintiffs received another cheque for RM10,000. It seemed that the 1st plaintiff had acknowledged receipt of RM10,000 by executing a document to the effect that this amount was a loan from the defendant to him and in the event of the sale of the businesses materialising, the said sum of RM10,000 would form part-payment of the purchase price. In the meantime, the defendant instructed

the solicitors, Wiman Chew & Co., to prepare formal sale and purchase agreements, namely AB3-12 and AB14-31, which the plaintiffs duly executed on 22 October 1990 at the solicitors' office in the presence of Mr. Wiman Chew. AB3-12 was an agreement for the sale of Syarikat Seng Fah, while AB14-31 was for the sale of the shares of Fah Bee Sdn. Bhd. These agreements were, however, not executed by Wonson. The 1st plaintiff, on the same day, received from Wonson two cheques for RM100,000 and RM385,000 which he and the 2nd plaintiff had acknowledged receipt thereof. See AB13 and AB32. Both cheques had been subsequently cleared.

Findings of the High Court

After hearing evidence and submissions of Counsel, the learned trial Judge gave judgment to the plaintiffs primarily on the ground that upon its true construction, his Lordship found AB1 to be the only concluded contract for the sale and purchase of the plaintiffs' businesses and therefore binding on the defendant. His reasons were these. First, he found the language in AB1 was plain and unambiguous. The terms of payment were clearly stipulated. The defendant had also admitted signing AB1 where his name appeared as the purchaser. Secondly, he held that the words "a formal agreement will be executed" by the parties in para. 2 of AB1 did not constitute or make AB1 a conditional agreement. He relied on *Esso Standard Malaya Bhd. v. Southern Cross Airways (M) Bhd.* [1972] 1 MLJ 168, which adopted the passage from the judgment of Parker J in *Von Hatzfeldt-Wildenburg v. Alexander* (*infra*) to the effect that it was a question of construction whether the execution of a further contract was a condition of the bargain or whether it was merely an expression of the desire of the parties as to the manner in which the transaction already agreed to would in fact go through. His Lordship was of the opinion that the reference to the proposed formal contract in AB1 merely showed a desire of the parties as to how the terms in AB1 was to be implemented.

On the two formal sale and purchase agreements, AB3-12 and AB14-31, his Lordship found that when they were drawn up, the defendant had still remained as the purchaser. He stated that if the defendant was acting for WONSON, there was no reason why all the payments could not come from WONSON. Indeed, his Lordship found no evidence that all the payments made to the plaintiffs came from WONSON. Nevertheless, he found that the only part which WONSON played was that it was unilaterally used by the defendant as a vehicle to make the purchase.

Thus, the primary issue in this appeal is whether, on its true construction, AB1 constitutes a concluded contract between the plaintiffs and the appellant. The material part of AB1 is para. 2, which states:

> It is proposed that a formal agreement will be executed between us within 4 (four) weeks from the date hereof. Should this agreement not be finalised by 23 October 1990, the sum of RM5,000 shall be forfeited by you.

The question here is whether para. 2 is a condition or term of the bargain between the parties, making AB1 a conditional contract until the execution of a formal agreement, or is the paragraph merely an expression of the desire of the parties as to the manner in which the transaction already agreed to will in fact go through? Our approach to the question will be to adopt first the *dictum* of Parker J in *Von Hatzfeldt-Wildenburg v. Alexander* [1912] 1 Ch. 284 at 288:

> It appears to be well settled by the authorities that if the documents or letters relied on as constituting a contract contemplate the execution of a further contract between the parties, it is a question of construction whether the execution of the further contract is a condition or term of the bargain or whether it is a mere expression of the desire of the parties as to the manner in which the transaction already agreed to will in fact go through. In the former case there is no enforceable contract either because the condition is unfulfilled or because the law does not recognize a contract to enter into a contract. In the latter case there is a binding contract and reference to the more formal document may be ignored.

In *Winn v. Bull* [1877] 7 Ch. D. 29, by a written agreement the defendant agreed with the plaintiff to take a lease of a house for a certain term at a certain rent, "subject to the preparation and approval of a formal contract." No formal or other contract was ever entered into between the parties. The defendant refused to take the lease in the present form contending that its terms were contrary to the intention of the agreement. The plaintiff thereupon brought the action claiming specific performance of the agreement. Jessel MR held that there was no contract. Relying on the judgment of Lord Westbury in *Chinnock v. Marchioness of Ely* 4 D.J. & S. 638 approved by the Court of Appeal in *Rossiter v. Miller* [1877] 5 Ch. D. 648, the learned Master of the Rolls concluded (at p. 32):

> It comes, therefore, to this, that where you have a proposal or agreement made in writing expressed to be subject to a formal contract being prepared, it means what it says; it is subject to and is dependent upon a formal contract being prepared. When it is not expressly stated to be subject to a formal contract it becomes a question of construction, whether the parties intended that the terms agreed on should merely be put into form, or whether they should be subject to a new agreement the terms of which are not expressed in detail. The result is, that I must hold that there is no binding contract in this case, and there must therefore be judgment for the defendant.

In *Ayer Hitam Tin Dredging Malaysia Bhd v. Y.C. Chin Enterprises Sdn. Bhd.* ('AHTD') [1994] 3 CLJ 133; [1994] 2 MLJ 754 the appellant wrote a letter to Y.C. Chin accepting their proposals for a project, subject to certain terms and conditions, one of which was that the said terms and conditions in the letter were to be constituted in an agreement and that appropriate indemnity clauses in favour of AHTD be incorporated in the agreement. Relying on the letter, Y.C. Chin proceeded to perform some of the obligations stated therein, although no formal agreement in writing had been executed. Subsequently, AHTD instructed Y.C. Chin to cease all work. The primary issue before the Court was whether there was a concluded contract between the AHTD and Y.C. Chin based on the said letter. The High Court found there was a contract and allowed Y.C. Chin's claim.

On appeal, the Supreme Court referred to several authorities on the question of arrangements made "subject to contract" or "subject to the preparation of a formal contract" or words to that effect. In the opinion of the Court, when such an arrangement is made, it will generally be construed to mean that the parties are still negotiating and do not intend to be bound until a formal contract is exchanged. However, having regard to the facts and circumstances of the case, the Court found that the case fell within the principles enunciated in *Crossley v. Maycock* [1874] 43 LJ Ch. 379 that if an agreement was made subject to certain conditions, then until those conditions were accepted, there was no enforceable final agreement.

Allowing the appeal, the Supreme Court held that on its true construction, the letter did not constitute a contract binding in law but was only a record of terms which were agreed as a basis for the negotiations of a contract.

In our view, when parties "proposed that a formal agreement would be prepared and executed", they must mean what they say. In the instant case, para. 2 clearly provides that a formal agreement will be executed within 4 weeks from the date of AB1 and should the formal agreement not be finalised by 23 October 1990, the sum of RM5,000 would be forfeited to the vendors. It is quite absurd to construe AB1 as a formal agreement which would mean that under para. 2, it has to be executed again within 4 weeks from the date in AB1. The events which followed after the 1st plaintiff received AB1 and the cheque of RM5,000 from the defendant seem to us to be consistent with the intention of the parties. First, the instruction to the solicitors to prepare the formal sale and purchase agreements, AB3-12 and AB14-31, which contained elaborate terms and conditions of the sale. This was followed by the execution of the said agreements by both plaintiffs at the solicitors' office on 22 October 1990, and the receipt of two cheques for a total sum of

RM485,000. It should be remembered that under para. 2 of AB1 the formal agreement must be finalised by 23 October 1990, otherwise the sum of RM5,000 would be forfeited by the plaintiffs. From the evidence, it is clear to us that the terms in AB1 were never performed and the parties proceeded to complete the sale on the basis of the terms and conditions of the formal agreements AB3-12 and AB14-31.

Paragraph 2 should also be considered in the light of para. 3 which contains, what purports to be, "the main terms of this agreement". In our view, the words "this agreement" cannot mean AB1, but must refer to the proposed formal agreement as envisaged in para. 2. It is noted that there are eight conditions in para. 3, which have not been expressed in greater detail. A prudent buyer of a medium-sized business which business he has agreed to purchase for RM1 million will surely want a more elaborate sale and purchase agreement containing specific clauses, such as, the firm's assets and liabilities, vendor's undertakings and warranties, appropriate indemnity clauses, etc. None of the above-mentioned clauses are, however, stipulated in para. 3.

Next, conditions (1), (2) and (3) of para. 3 refer to the purchase consideration, which stipulate the schedule and time of payment of the purchase price to be calculated from the date of the execution of the agreement. In our view, time cannot run from the date of the signing of AB1 because it cannot be the intention of the parties nor will it be reasonable for the defendant who had paid RM5,000 as earnest money and part-payment, which will be forfeited if the formal agreement is not finalised by 23 October 1990, and at the same time (upon signing of AB1) he must also pay RM100,000 under condition (1) of para. 3 of AB1. The inference must be that payments will be made at the stipulated period of time which runs from the date of the execution of the formal agreement.

Having regard to what we have stated above, our answer to the primary issue in this appeal is that, on its true construction, in particular para. 2 thereof, AB1 does not constitute a legally binding contract between the parties, but merely a letter written by the defendant to the plaintiffs expressing a willingness to purchase the latter's businesses and a basis for, and subject to the preparation and execution of a formal agreement containing elaborate terms and conditions.

Our answer to the above primary question of law is sufficient to dispose of this appeal. However, in view of the finding of the learned trial Judge that WONSON was "used" by the defendant as a vehicle to make the purchase on his behalf and therefore the company was not the actual purchaser of the plaintiffs' businesses, we feel the short answer is this. Upon considering the

contemporaneous documents in the "Rekod Rayuan", with respect, we disagree with his Lordship's conclusion that WONSON was not the actual buyer. First, there was an admission by the 1st plaintiff that he received two cheques of a substantial sum for RM385,000 and RM100,000 after both plaintiffs had executed AB3-12 and AB14-31. These cheques belonged to WONSON and AB13 and AB32 are plaintiffs' acknowledgement of the receipt of the money from WONSON and not from the defendant. Secondly, the list of employees in the schedule under EPF contributions dated 24 July 1991 filed by the employers shows both plaintiffs were employees of WONSON. There is also the notification by WONSON to the Director-General of Inland Revenue under s. 83(3) of the Income Tax Act 1967 stating that the 1st and 2nd plaintiffs were employed by WONSON as manager and supervisor respectively. See Rekod Rayuan 3 - pp. 738, 740. Thirdly, by a letter dated 17 July 1991, the 1st plaintiff informed WONSON that he had executed Form M.V. 3 to transfer the ownership of the firms' three vehicles to WONSON. See Rekod Rayuan 2 - pp. 197-201. Clearly, these documents point only to one conclusion, which is, that upon signing the agreements, AB3-12 and AB14-31, and after receiving the sum of RM500,000, the plaintiffs handed over the management and control of their businesses to WONSON and also became the latter's employees. It follows that WONSON was the real purchaser of the plaintiffs' businesses under AB3-12 and AB14-31, despite the non-signing of the agreements by WONSON.

For the above reasons, we allow this appeal and set aside the judgment of the Court below. Costs here and below to the defendant. The deposit is to be refunded to the defendant.

Reported by WA Sharif